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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

ANDREW PASHA, PETER GRAFNER,
ARTHUR MONACO,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioners, Andrew Pasha, Peter Grafner, and Arthur Monaco, pray that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit in the above case.

JUDGMENT AND OPINION OF THE COURT BELOW

The judgment of the United States District Court for the Northern District of Illinois, Eastern Division, was entered on February 28, 1963, and is not reported, but appears in the printed Appendix filed with, and certified by, the Clerk of the United States Court of Appeals as a part of this record, and transmitted herewith.

The opinion of the United States Court of Appeals for the Seventh Circuit, affirming said judgment, was filed on

the 22nd day of May, 1964. That opinion is not yet reported, but is set forth in the Appendix hereto, and in the certified copy of the record.

JURISDICTION

The order of the United States Court of Appeals for the Seventh Circuit, affirming the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, was filed on the 22nd day of May, 1964. On June 17th, 1964, it was ordered that the petition for re-hearing be denied. (These orders appear in the Appendix hereto.) This petition is filed within thirty days of the denial of the petition for rehearing in the United States Court of Appeals for the Seventh Circuit. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Did not the Court of Appeals err in holding that there was no interception within the meaning of Sec. 605, Title 47 U.S.C. when agents of the internal revenue service entered premises under the authority of a search warrant, handcuffed the defendants and without their permission proceeded to answer incoming calls on the telephones and even misrepresented themselves to be the defendants, and thereafter testified at the trial and divulged the contents of the incoming messages.

2. Did not the Court of Appeals err in finding such action was not a violation of the Fourth and Fifth Amendments to the Constitution of the United States?

3. Did not the Court of Appeals err in holding that *Rathbun* v. *U.S.*, 355 U.S. 107, was applicable even though no party to the said telephone conversations gave his consent, and further that interception "connotes a situa-

tion in which by surreptitious means a third party overhears a telephone conversation between two persons. We believe that impersonation of the intended receivers is not an interception within the meaning of the statute".?

4. Does the authority of a search warrant extend to permitting the executing officers, upon their entry onto the premises, to answer telephones and otherwise conduct the business of the persons whose premises is being searched, even to the point of misrepresenting themselves to be such persons?

5. Was probable cause for the issuance of a search warrant established by an internal revenue agent's affidavit stating that he had "reason to believe" that at certain premises "there is now being concealed certain property * * * (described) * * * relating to the business of accepting wagering", and that such belief was based upon personal observations, information received from other investigators, and reports from police officers in other cities, where it could not be determined from the affidavit which statements therein were based on personal knowledge of the affiant and which were hearsay?

6. Was probable cause for the issuance of a search warrant established by an internal revenue agent's affidavit stating that he "had reason to believe" that upon certain premises "there is now being concealed certain property, namely, memoranda, betting slips, betting pads, books, records of bets, tickets, scratch sheets, telephones, U.S. currency, calculating machines, and diverse other tools, instruments, apparatus, receptacles and records, relating to the business of accepting wagering", when there is no personal knowledge or even hearsay as to the existence of such property at the premises described?

7. Where the criminal sanctions of an internal revenue statute do not provide penalties for the wilful failure to register as a person in the business of accepting wagers, can a regulation promulgated by the Secretary of the Treasury make such failure a criminal act in the light of the well known maxim: "*delegata potestas non potest delegari*"?

8. If it is for the Congress to prescribe penalties for the laws it writes, was it not error for the Court to rule in effect that the Secretary of the Treasury could alter or amend a penal revenue law?

STATUTES INVOLVED

Section 4411, Title 26, United States Code, provides:

"There shall be imposed a special tax of $50 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable.".

Section 4412, Title 26, United States Code, provides:

"(a) *Requirement.*—Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district—

(1) his name and place of residence;

(2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person.

(c) *Supplemental information,* — In accordance with regulations prescribed by the Secretary, he or his delegate may require from time to time such supplemental information from any person required to register under this section as may be needful to the enforcement of this chapter."

Section 7203, Title 26, United States Code, provides:

"Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

Section 6011, Title 26, United States Code, provides:

(a) *General rule.*—When required by regulations prescribed by the Secretary or his delegate any person made liable for any tax imposed by this title, or for the collection thereof, shall make a return or statement according to the forms and regulations prescribed by the Secretary or his delegate. Every person required to make a return or statement shall include therein the information required by such forms or regulations.

Treasury Regulation Section 44.4412-1(a) reads in part:

"Every person required to pay the special tax imposed by section 4411 shall register and file a return on Form 11-C. For provisions relating to the general requirement for filing a return, see Section 44.6011 (a)-1."

Treasury Regulation Section 44.6011 (a)-1 (b) reads:

"Every person required to pay the special tax imposed by Section 4411 shall make a return on Form 11-C in accordance with the instructions and regulations applicable thereto."

Section 605, Title 47, United States Code, provides:

"No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and

use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; *Provided,* That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress."

STATEMENT OF THE CASE

This is an appeal from a judgment of conviction on a two count indictment, charging violations of Section 7203, Title 26, United States Code.

The case was tried, before a jury, which returned a verdict of guilty on both counts, upon which judgments of conviction were entered and sentence imposed upon each of the defendants, from which convictions and sentences an appeal was taken.

These defendants were each sentenced to the custody of the Attorney General for a period of one year on each of counts 1 and 2, the sentence on count 2 to run concurrently with the sentence on count 1, and fined $1,000 and cost of prosecution on each of said counts 1 and 2, said fines being cumulative or a total fine of $2,000, the defendants respectively to stand committed until the fines and costs imposed are paid.

The errors complained of below arose out of the indictment, illegally obtained evidence; the insufficiency of the evidence; erroneous admission of evidence; restriction of cross-examination; failure to declare a mistrial because of the prejudicial statement of a government witness; the instructions; the atmosphere of impartiality; and, imposing maximum penalties for standing trial.

The United States Court of Appeals for the Seventh Circuit affirmed the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, and denied the defendant's petition for rehearing.

STATEMENT OF FACTS

This cause commenced by the filing of an indictment in the Northern District of Illinois, Eastern Division on the 27th day of November, 1962, charging, in the first count, that each of these defendants, beginning about April 25, 1960 and continuing to about April 27, 1960 were engaged in the business of accepting wagers on their own behalf and on behalf of other persons engaged in the business of accepting wagers, without paying the special occupational tax on wagering for the taxable period ended June 30, 1960, and that such failure to pay the special occupational tax was wilful and knowing. Count 2 charged the same named defendants did, on or about the same dates willfully and knowingly, fail to register and to file a *return*, Internal Revenue Service Form 11-C with the District Director of Internal Revenue at Chicago, Illinois. Both counts were brought under the provisions of Section 7203, Title 26, United States Code. (A. 11-12)

On January 2, 1963, these defendants moved the court, inter alia, to dismiss the indictment on the grounds that it did not satisfy the requirements of the Sixth Amendment

to the Constitution of the United States and Rule 7 of the Federal Rules of Criminal Procedure; that it pleaded conclusions and not fact allegations; that count 2 of the indictment failed to charge an offense proscribed and sanctioned by the criminal statutes of the United States even by conclusion; that special specific penalties were provided in Section 7262 and 7272 of Title 26, United States Code, for the failures and omissions here attempted to be charged, and that therefore bringing the charge under the general provisions of Section 7203 of Title 26, was improper; and, that count 2 of the indictment, attempting to impose criminal sanction by way of regulation, was a null and void attempt to delegate to the executive powers restricted to the legislature. (A. 13-15).

In answer, the Government made general denial of the bases of the Motion, except in regard to Count 2, wherein it set forth the statutory provisions and administrative provisions and regulations which the Government contended supported the Count as charging a crime. (A. 21-24). The Motion to Dismiss was denied (A. 26).

On January 2, 1963, and on January 28, 1963, three Motions for Suppression of Evidence were filed on grounds, inter alia, that the search warrants were insufficient on their face; that they authorized search for evidence as opposed instrumentalities of crimes; that the property sought to be seized were not sufficiently identified, that the affidavits made to secure the issuance of the search warrants were insufficient to support any finding or belief or satisfaction that there was probable cause to believe that the property described in the search warrant was unlawfully concealed, and violation of Title 47 U.S.C. 605. (A. 27-44, 2, 3). A hearing was had on the

said Motions to Suppress. (A. 44-83), which said Motions were denied on January 30, 1963 (A. 4).

The case proceeded to trial on February 14, 1963, and continued on succeeding court days through February 21, 1963. (A. 83-201).

These defendants moved for judgment of acquittal at the close of the Government's case and at the close of all the evidence (A. 5), which Motions were denied (A. 5). They also so moved after verdict, which Motion was also denied. (A. 5).

Motions for new trial and in arrest of judgment were filed by all defendants, which said motions were denied on February 28, 1963. On the same date, the sentences hereinbefore described were imposed. (A. 213-220).

These defendants filed their Notice of Appeal to the Court of Appeals for the Seventh Circuit on March 1, 1963. (A. 221-222).

AFFIDAVITS FOR SEARCH WARRANTS

Two identical affidavits were made in applying for the two warrants, except that it involved two different addresses. One was 5129 W. Diversey and the other was 3157 N. Leclaire Ave., both in Chicago, Illinois. (A. 31-51). The contents, except for addresses, of the affidavits are as follows.

AFFIDAVIT FOR SEARCH WARRANT.

Before C. S. Bentley Pike, Room 828, U. S. Court House, Chicago, Illinois.

The undersigned being duly sworn deposes and says:

That he has reason to believe that on the premises * * *, there is now being concealed certain property,

namely Memoranda, betting slips, betting pads, books, records of bets, tickets, scratch sheets, telephones, U. S. currency, calculating machines, and divers other tools, instruments, apparatus, receptacles and records, relating to the business of accepting wagers, which are being used or have been used on the aforesaid premises in the carrying on of the business of accepting wagers, without there first having been paid the special tax imposed on such business by Section 4411, Title 26, U. S. Code, in violation of Section 4901, Title 26, U. S. Code, and thus made subject to seizure by Section 7302, Title 26, U. S. Code.

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows:

That the undersigned deponent, Clarence S. Leiter, is and has been for the past eight years a duly qualified and appointed Special Agent of the Intelligence Division of the Internal Revenue Service of the United States of America and that he has had approximately two years' experience in the investigation of cases involving Federal wagering taxes; that he is presently assigned as a Special Agent of the Intelligence Division, Internal Revenue Service, in the Chicago Internal Revenue District, and that as part of his official duties he did make and supervise other agents in the making of an investigation concerning premises known as 3157 North Leclaire Avenue, Chicago, Illinois; that agents acting under his supervision maintained a surveillance of the premises located at 3157 North Leclaire Avenue, Chicago, Illinois on March 26, 1960 to and including April 2, 1960. That during this period the aforesaid agents observed Arthur Monaco, Andrew Pasha and Peter Grafner enter Apartment 1A at 3157 North Leclaire Avenue, Chicago, Illinois, on each day except Sunday, March 27, 1960, at approximately twelve noon and remain there until approximately six o'clock p.m.; that on Monday,

April 4, 1960, agents acting under his supervision observed the premises at 3157 North Leclaire Avenue, Chicago, Illinois, and did fail to observe Andrew Pasha, Arthur Monaco and Peter Grafner entering or leaving the premises; that on April 20, 1960, to and including April 25, 1960, agents acting under his supervision maintained a surveillance at 5129 West Diversey Avenue, Chicago, Illinois; that on each of the days April 20, 1960, to and including Saturday, April 23, 1960, the agents observed the aforesaid Arthur Monaco, Andrew Pasha and Peter Grafner enter a store, bearing lettering on the front window, to wit: Goodman Design & Engineering Co., at the east end of a one-story store building located at 5129 West Diversey Avenue, Chicago, Illinois, at approximately twelve o'clock noon and remain therein until approximately six o'clock p.m.; that on April 25, 1960, agents acting under deponent's supervision while conducting a surveillance at 5129 West Diversey Avenue, Chicago, Illinois, observed the aforesaid Arthur Monaco approach the rear door of the easternmost store at 5129 West Diversey Avenue, Chicago, Illinois, at approximately 11:20 A.M. and shortly thereafter leave from the rear door of the aforesaid premises and enter the driver's seat of a green Cadillac sedan, bearing 1960 Illinois license No. 1158139; that at approximately the same time the aforesaid agents observed a man enter the front door of the easternmost store at 5129 West Diversey Avenue, Chicago, Illinois, carrying a folder approximately 12″ x 14″ in dimensions and shortly thereafter leave the aforesaid premises by the rear door and enter the green Cadillac with Arthur Monaco; and that immediately thereafter the green Cadillac drove away; that at approximately twelve o'clock noon the aforesaid agents observed a grey Cadillac sedan, bearing 1960 Illinois license No. 2350 635, drive up and

park across the street from 5129 West Diversey Avenue, Chicago, Illinois, and observed Andrew Pasha leave the grey Cadillac and enter the front door of the easternmost store at 5129 West Diversey Avenue, Chicago, Illinois, and observed the same Andrew Pasha leave the store approximately four minutes later, carrying a bundle of white paper of the approximate size of a rolled-up newspaper and enter the grey Cadillac and drive off.

Deponent further states that agents acting under his supervision while conducting a surveillance of Apartment 1A on the first floor of the building located at 3157 North Leclaire Avenue, Chicago, Illinois on April 25, 1960, at approximately 12:50 P.M. observed the grey Cadillac, 1960 Illinois license No. 2350 635 and the green Cadillac, 1960 Illinois license No. 1158139, parked in close proximity to the premises known as 3157 North Leclaire Avenue, Chicago, Illinois; that said agents later on the same day, April 25, 1960, at approximately 7:25 P.M. observed the aforesaid Arthur Monaco, Andrew Pasha and Peter Grafner leave Apartment 1A on the first floor at the North end of the building located at premises known as 3157 North Leclaire Avenue, Chicago, Illinois.

Deponent further states that information obtained from responsible officials of the Illinois Bell Telephone Company of Chicago, Illinois, discloses that telephone numbers KIldare 5-0734 and KIldare 5-4803 are listed in the name of Frank D. Miano at 3157 North Leclaire Avenue, Apartment 1A, Chicago, Illinois.

Deponent further states that he has information from Special Agent Eugene Uitz, Milwaukee, Wisconsin, that a check of the telephone records in Milwaukee, Wisconsin discloses that during the period February 9, 1960 to March 9, 1960 ten long distance telephone calls were

made to KIldare 5-4803 from Milwaukee, Wisconsin telephone No. FR. 2-1435, and one long distance call was made to KIldare 5-4803 from Milwaukee telephone No. FR. 2-3530 and that Milwaukee telephone numbers FR. 2-1435 and FR. 2-3530 are listed to Ray Hobart of Milwaukee, Wisconsin, and that Ray Hobart is a known gambler in the Milwaukee area.

Deponent further states that information obtained from responsible officers of the Illinois Bell Telephone Company, Chicago, Illinois, discloses that during the period December 31, 1959 to January 7, 1960, eighteen long distance telephone calls were made from New Orleans, Louisiana to Chicago telephone Nos. KIldare 5-0734 and KIldare 5-4803, which were charged to Illinois Bell Telephone Company credit card No. 97M-549-3846; that said credit card is issued to Harry H. Schroeder of 639 West Oakdale Avenue, Chicago, Illinois; that during the period December 31, 1959 to January 27, 1960, there were charged to the aforesaid credit card No. 97M-549-3846 in the name of Harry Schroeder the following long distance telephone calls:

Three calls from Chicago, Illinois to Miami, Florida, telephone No. JE 8-4057;

Forty-three calls from Chicago, Illinois to Miami, Florida, telephone No. JE 8-7673;

Ten calls from Chicago to New Orleans, Louisiana, telephone No. WH 7-0611;

Five telephone calls from Chicago, Illinois, to Cincinnati, Ohio, telephone No. AX 1-2144;

Seven telephone calls from Chicago, Illinois to Covington, Kentucky, telephone No. AX 1-2144; and

Seventeen telephone calls from Chicago, Illinois to Dixon, Illinois, telephone No. AT 3-1831;

and that from March 4, 1960 to April 2, 1960 the following long distance calls were charged to Credit Card No. 97M-549-3846 in the name of Harry H. Schroeder:

Fifteen telephone calls from Chicago, Illinois to Milwaukee telephone No. FR 2-3530;

Five telephone calls from Chicago, Illinois to Miami, Florida telephone No. JE 8-7673;

Six telephone calls from Chicago, Illinois to Miami, Florida telephone No. UN 5-5613;

One telephone call from Chicago, Illinois to Cincinnati, Ohio telephone No. AX 1-2144;

Nine telephone calls from Chicago, Illinois to Covington, Kentucky telephone No. AX 1-2144; and

Twenty telephone calls from Chicago, Illinois to Dixon, Illinois telephone No. AT 3-1831.

Deponent further states that he has received reports from the Chief, of the Intelligence Division, at Jacksonville, Florida, and at New Orleans, La., which indicate that Miami, Florida telephone Nos. JE 8-4057, JE 8-7673 and UN 5-5613, and New Orleans telephone No. WH 7-0611, listed above herein, are registered to or used by persons who are known to be gamblers.

Deponent further states that he has received a report from the Chief of the Intelligence Division, Louisville, Kentucky, which states that Cincinnati, Ohio telephone No. AX 1-2144 and Covington, Kentucky telephone No. AX 1-2144 listed above herein are subscribed to by H. A. Fogel under the name of Lloyd Sales Agency, 341 East Tenth Street, Newport, Kentucky and that H. A. Fogel is a well-known bookmaker in the area who has paid tax as a gambler and has a current wagering occupational tax stamp.

Deponent further states that information on file in the office of the District Director at Chicago, Illinois discloses

that Dixon, Illinois telephone No. AT 3-1831, listed above herein, is subscribed to by Frank J. Lloyd, 1511 West 1st Avenue, Dixon, Illinois, and further that information on file in the office of the Director of Internal Revenue at Chicago, Illinois discloses that Frank J. Lloyd is a known gambler believed to be operating a wire service in and about Dixon, Illinois who has on two occasions been arrested for bookmaking by county authorities.

Deponent further states that information received from responsible officials of the Illinois Bell Telephone Company, Chicago, Illinois discloses that one telephone number, NA. 2-8600, is installed at 5129 West Diversey Avenue, Chicago, Illinois and listed to the subscriber, Goodman Design and Engineering Company and that during the period December 31, 1959 to and including January 27, 1960 a total of 22 long distance telephone calls were made from Miami, Florida and New Orleans, La. to that number which telephone calls were charged to Illinois Bell Telephone Company Credit Card No. 97M-549-3846, registered in the name of Harry H. Schroeder, 639 West Oakdale Avenue, Chicago, Illinois.

Deponent further states that in his official capacity as a Special Agent of the Internal Revenue Service he has carefully examined all records maintained by the Internal Revenue Service at Chicago, Illinois which have reference to the special tax returns and applications for registry-wagering filed by persons with the District Director of Internal Revenue at Chicago, Illinois; and deponent further states that there is no record in said office for the fiscal period beginning July 1, 1959 or to date of the filing of a special tax return and application for registry-wagering by Arthur Monaco, Andrew Pasha or Peter Grafner and that the records of that office disclose that no person has registered as being engaged in wagering

at 5129 West Diversey Avenue, Chicago, Illinois or at 3157 North Leclaire Avenue, Chicago, Illinois; that attached hereto and made a part of deponent's affidavit is the supporting affidavit executed by Special Agent Edwin W. Julius.

Deponent further states that he has received information from The Chicago Police Department, that Frank D. Miano, who is listed as the subscriber to telephone numbers KI 5-4803 and KI 5-0734, at Apt. 1A, 3157 N. Leclaire, was arrested by Chicago Police on August 7, 1956 in connection with a gambling investigation.

Deponent further states that he has received information from The Chicago Police Department, that Andrew Pasha was arrested by Chicago Police on July 28, 1956 for bookmaking, accepting wagers by telephone, and on December 4, 1959 for being a patron of a gambling establishment.

Deponent further states from his experience in investigating gambling operations that persons engaged in accepting telephone wagers operate from two or more locations, moving back and forth from time to time.

Deponent further states that by reason of his experience in investigating wagering cases and by reason of the facts alleged hereinabove he believes that a telephone wire service for wagering has been conducted by Arthur Monaco, Andrew Pasha and Peter Grafner from April 20, 1960 to and including April 23, 1960. • • •.

Clarence S. Leiter,
Special Agent.

Sworn to before me this 27th day of April, 1960, at Chicago, Illinois.

C. S. Bentley Pike,
United States Commissioner.

State of Illinois }
County of Cook } ss.

I, Edwin W. Julius, being first duly sworn upon my oath depose and say:

That, I have been employed as a Special Agent for the Intelligence Division, Internal Revenue Service, United States Treasury Department continuously for the past twelve years;

That I was assigned to investigate a suspected gambling operation at 3157 North LeClaire Avenue, Apartment 1-A, Chicago, Illinois;

That in connection with the investigation I, with other Special Agents, kept the entrance to 3157 North LeClaire Avenue, Apartment 1-A, Chicago, Illinois, and 5129 West Diversey Avenue, Chicago, Illinois, under surveillance on various dates;

That a summary of the surveillance is as follows:

March 30, 1960.

Maintained surveillance with Special Agent Rodney Melton of 3157 North LeClaire Avenue, Chicago, Illinois. Arthur Monaco was observed at 11:45 a.m., going into 3157 North LeClaire Avenue, Apartment 1-A, and at 7:35 p.m., Arthur Monaco, Andrew Pasha, and Peter Grafner, were observed leaving aforementioned apartment.

April 5, 6, 7, 15, and 19, 1960.

Maintained surveillance of 3157 North LeClaire Avenue, Apartment 1-A, Chicago, Illinois, each day from approximately 10:00 a.m. until 1:00 p.m., and observed no entrances by Arthur Monaco, Andrew Pasha, or Peter Grafner.

April 20, 1960.

Maintained surveillance with Special Agents S. Bierman, J. Howley, P. Tillotson, and D. Jaster, of 5129 West Diversey Avenue, Chicago, Illinois, observed that Arthur Monaco and Andrew Pasha at approximately 11:30 a.m., entered store at 5129 West Diversey Avenue, Chicago, Illinois. At 7:40 p.m., Arthur Monaco, Andrew Pasha, and Peter Grafner were observed leaving aforementioned store.

April 22, 1960.

Maintained surveillance with Special Agent Paul Tillotson. At approximately 10:45 a.m., observed Arthur Monaco, Andrew Pasha, and Peter Grafner, unlocked the door and enter the store at 5129 W. Diversey Avenue, Chicago. At approximately 11:45 a.m. Andrew Pasha was seen putting paper into an oil drum at the rear of the aforementioned store and setting fire to the contents of the oil drum. At 6:45 p.m., Arthur Monaco, Andrew Pasha, and Peter Grafner were observed leaving the front door of the aforementioned store.

April 25, 1960.

Maintained surveillance with Special Agent Paul Tillotson. Observed at 11:20 a.m., Peter Grafner unlock the front door of the aforementioned store and enter. He was carrying a folder approximately 12 x 14 inches in size. Almost simultaneously the automobile of Arthur Monaco drove up to the rear of the aforementioned store and Arthur Monaco got out and approached the rear door of the store. About the same time Peter Grafner emerged from the rear door of the store and the two returned to Arthur Monaco's car and drove east in the alley. At approximately 12:00 o'clock noon, Andrew Pasha drove up and parked across the street. He approached, unlocked

the door and entered the store at 5129 West Diversey, Chicago, a few minutes later he came out carrying a bundle of white paper, approximately the size of a roll of newspaper. He drove west on Diversey Avenue in his automobile.

April 26, 1960.

Maintained surveillance with Special Agent Burt Homa. Observed at 11:25 a.m., Andrew Pasha unlock the door and enter Apartment 1-A at 3157 North LeClaire Avenue, Chicago. At approximately 11:50 a.m., Arthur Monaco unlocked the door at the aforementioned apartment and entered. He was accompanied by Peter Grafner and a third man who was the driver of the automobile that they used. This automobile bore Illinois 1960 license plate No. 746 564, registered to R. Lyma, 5343 North Linder, Chicago. At approximately 7:00 p.m., the aforementioned four persons were seen leaving Apartment 1-A, at 3157 North LeClaire Avenue, Chicago.

Edwin W. Julius.

Subscribed and sworn to before me this 27th day of April, 1960.

C. S. Bentley Pike,
Notary.

THE SEARCH OF APRIL 27, 1960.

At about 11:05 a.m. on the above date, all three defendants were seen entering the apartment at 3157 North Leclaire. At 1:05 p.m., on that date, Monaco was observed coming out of the apartment. (A. 97-98).

At approximately 2:15 p.m., nine or ten Government Agents went to apartment 1-A at that address, announced that they were Federal Agents with a search warrant, and hearing no reply, forced open the door with a seven-

foot post, which they rammed against the door three or four times. Entering the apartment, they found it to be a three-room motel-type or kitchenette. In the living room was the ordinary type of living room furniture. The next room was a dinette, where there was a table and adjoining it was a picnic table that was opened out. There were three telephones on the tables.

The defendants, Pasha and Grafner were ordered to put up their hands, they were handcuffed, and ordered to sit down. (A. 121).

Later the defendant Monaco came through the door accompanied by Internal Revenue Agent McDermott, and possibly, Internal Revenue Agent Kruger. Both agents were armed. He was questioned by Internal Revenue Agent Julius who told him he would like to see his keys. Monaco asked if he was under arrest and he was told he was not. He motioned to his coat that was hanging on a chair and Julius took the keys out of his coat. He was not handcuffed. (A. 121-122). One of the keys had a tag on it "Leclaire". Agent Julius tried it in the lock and it opened the door.

At about 2:30 the handcuffs were taken off Grafner, but it was necessary to get a locksmith to take them off Pasha. Julius testified the defendants were told they were not under arrest, and were not restrained from leaving, but they did not sit there voluntarily for three hours. The defendants were not at any time taken before a United States Commissioner or magistrate for arraignment. The defendants remained there until 5:30 p.m. (A. 122).

At about 6:30 p.m. five Internal Revenue Agents went to 5129 West Diversey. There was no one there and they entered the store. The store had lettered across the

window "Goodman Design and Engineering Company." Half way back in the store was a partition that extended about three-quarters of the way across the width of the store. The front portion of the store was vacant, except for a phone in the middle of the floor which was not connected. In the back, behind the partition, there were three desks and three additional telephones. There was a radio and an electric clock. There were uncompleted slips of the type described before, there were wrapped in a wrapping from the printer with the printer's name and seal indicating the name of the printer who had prepared the slips. There was some completed slips found in the drawers of the desk. (A. 106-107).

THE PHONE CALLS.

Immediately upon entering the premises at 3157 No. Leclaire, Apartment 1-A, Internal Revenue Agents proceeded to answer the phones as they rang. This was done pursuant to the assignment. (A. 87). At 2:31 p.m., the phone rang, and the voice at the other end, a male voice, said, "Hello, Who is this?" Agent Burton Homa answering the phones said, "Andy." The voice on the other end said, "Hold on a minute." Then someone else got on. Again it was a male voice, and said, "Number 16." Homa said, "yes." The other party hung up. At 2:29 p.m., Homa received another telephone call. A man's voice said, "Hello, Andy?" Homa said, "He's not here". The voice said, "Arty?" Homa said, "He's out." The man said, "Pete?" Homa answered "yes", and the party hung up. At 2:44 p.m., Homa received a telephone call, and a man's voice said, "Hello. Number 10?" Homa said, "Yeah." The party said, "Is this number 10?" Homa said, "Yes," and the party hung up. At 2:51 or 3:10 p.m., Homa answered another phone ring, and a man's voice said, "Is

Pete there?" Homa said, "No, this is Andy". The party at the other end said, "I heard there's a general raid all over the country, the G's." Homa said, "Oh?" and the party said, "They got a guy in New Orleans." At 2:50 p.m., Homa answered the phone when it rang, and a male voice at the other end said, "Hello, who is this?" Homa said, "Andy." The voice at the other end said, "What happened in the first at Keeneland?" Homa said, "The results aren't in yet." The party at the other end said, "I'll call back." (A. 90-91).

Special Agent Paul Crusor proceeded pursuant to a like assignment to answer another phone as the phone rang. At 3:31 p.m., it did ring, he said to the telephone, "Hello". The caller stated. "Eighth at New York, Number 12, World Ruler, 10 across.", and hung up. At 3:47 p.m., the phone again rang, and Crusor answered it and the caller stated to call him back at St. Louis and hung up. At 4:28 the phone again rang and the caller stated, "Number 35 to Andy. Results of the seventh at Sportsmans, and the eighth at Laurel," and hung up. Agent Paul Crusor testified that he was assigned to answer the phones by Special Agent Edward Julius, that he didn't know who was at the other end of the conversations, and for all he knew it could have been an Internal Revenue Agent. (A. 140-143).

REASONS FOR GRANTING THE WRIT

This Court should exercise its jurisdiction in this case for the following reasons:

1. If *Rathbun* v. *U.S.*, 355 U.S. 107, in holding that evidence obtained by police officers listening in to a telephone conversation *with the consent of one of the parties* did not violate the federal wiretapping Act 47 U.S.C. Sec.

605, is decisive then the opinion of the Court of Appeals is in conflict with such decision in holding that interception connotes a third party overhearing a conversation between two persons and further that impersonation of the intended receiver *without his consent* is not an interception.

II. The decision below has been hailed as a "momentous Court decision" upholding the right of law officers on raids to answer telephones located on the raided premises and through impersonation of the intended receivers to secure evidence of criminal activity and divulge the content of such calls in Court trials. There is involved herein an important question of federal law, involving enforcement of 47 U.S.C. 605 and the Fourth and Fifth Amendments, which has not been, but should be settled by this Court.

III. This decision is in direct conflict with *United States* v. *Ventresca*, 1 Cir., 324 F.2d 864, wherein an affidavit substantially the same as that filed here was found insufficient to sustain a warrant. This Court has granted certiorari in *Ventresca* on the petition of the government. The considerations inherent is granting the writ also obtain here, and this case should be considered together with *Ventresca* (No. 782 Oct. 1963 Term).

IV. The Court of Appeals has so far sanctioned a departure from the accepted and usual course of judicial proceedings by a lower court as to call for an exercise of this Court's supervision by affirming a conviction based upon evidence secured under a search warrant which stated no reason for believing the specifically described property would be found on the premises. Its decision is in conflict with many District Court decisions striking down such warrants as clearly insufficient.

V. Conviction on Court II of the Indictment is in conflict with applicable decisions of this Court, in derogation of the separation of powers commanded by the Constitution, and requires the exercise of this Court's power of supervision to prevent the imposition of criminal penalties for the failure to comply with Executive (Treasury) regulation.

I.

In this case Internal Revenue Agents entered the premises for which the search warrants issued, and answered the phones as they rang, stating in response to inquiries that they were one or the other of the petitioners, and thereby received the communication intended for whichever of the three petitioners so impersonated. Full contents of these calls are found hereinbefore at pages 22-23.

This Court said in *Rathbun* v. *United States*, 355 U.S. 107 that:

> "Each party to a telephone conversation takes the risk that *the other party* may have an extension telephone and *may allow* another to overhear the conversation. When such takes place, there has been no violation of any privacy of which the parties may complain. Consequently, one element of Sec. 605, *interception*, has not occurred." 335 U.S. 111. (First two emphases ours; third, by the Court)

The petitioners cited *Billeci* v. *United States*, 184 F.2d 394, 397 which approved an interception but contained a caveat. The Court stated:

> "We think that interception of a phone call necessarily involves the idea that a speaker thinks he is talking to one person whereas in fact a third person is listening. When a person calls a number on the telephone and speaks a message to whoever answers,

we do not think that he can claim that his message was intercepted, merely because the person responding is not the person he intended to speak to. *We inimate no opinion upon a situation in which the responding party impersonates the person for whom the call is avowedly intended.*" (Emphasis supplied)

The Court of Appeals for the Seventh Circuit found that interception connoted only a third party overhearing a conversation between two persons. This is directly in conflict with *United States* v. *Polakoff*, 112 F.2d 888. Incidentally the holding by this Honorable Court in *Rathbun* gave recognition to the principles enunciated in the *Polakoff* case. Judge Learned Hand, in the *Polakoff* case, stated at Page 889:

> "The statute does not speak of physical interruption of the Circuit, or of 'taps'; it speaks of 'interception' and anyone intercepts a message to whose intervention as a listener the communicant do not consent; the means he employs can have no importance; it is the breach of privacy that counts."

The statute (47 U.S.C. 605) itself is clear. It reads in part:

> "• • • no persons *not being entitled thereto* shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefits or for the benefit of another entitled thereto • • •." (Emphasis ours)

Rathbun, *Polakoff*, and *Billeci* gave heed to the statutory requirement of entitlement. In *Rathbun*, since the subscriber was the intended listener, and since he consented to divulge the communication, the manner of his divulgence was immaterial. In *Billeci*, the Court drew on common experience that a failure to identify a listener before pro-

ceeding to deliver the communication implied "entitlement" in anyone who happened to pick up the phone. *Polakoff* condemned receipt and divulgence of information, where entitlement was not present. We submit the conflict between those cases and this consists in the failure to give heed to the requirement of "entitlement" expressed in the statute; that interception by trick is clearly violative of § 605, the intruder is not entitled to receive the communication, and divulging the contents of the communication is within the proscription of that statute.

II.

Some of the agents executing the search warrant in this cause had prior specific directions and assignment to monitor the phones immediately upon entering onto the premises under the authority of the search warrant. Pursuant to that direction the conversations as set forth at Pages 22-23 hereof, were made part of the evidence. We submit that this Court should grant certiorari on account of the direction and this manner of execution of the warrant in that, we respectfully submit, the decision of the Seventh Circuit approving such conduct is in conflict, initially, with applicable decisions of this Court. It is our further submission that this is an important question of Federal law involving enforcement of 47 U.S.C. 605 and the Fourth and Fifth Amendments which has not precisely been, but should be, settled by this Court.

It is our submission that nothing could be more basically the abuse of search warrants than using the warrant as a guise to enter onto premises for the specific purpose of securing evidence as was done in this case. "Mere evidence" may not be seized as an incident to a search even under a lawful warrant. Such seizure of "evidence" of a

crime would be in effect compulsory self-incrimination. See this Court's decision in *Abel* v. *United States*, 331 U.S. 145, 154. In this regard the determination of the Seventh Circuit in this cause, endorsing the designed and purposeful securing of evidence after entry was made under the search warrant is contrary to this Court's decision in *Abel* v. *United States*, 362 U.S. 217, 234-238.

We submit to this Court that this question has reached an importance that is worthy of determination by this Court in view of the holding-out of this decision as an innovation in criminal law. It has been considered of sufficient import to have been denominated in the newspapers as a milestone in the laws of searches and seizures, and is being used as a predicate upon which search warrants are issuing both in the Federal Courts and in the State Courts. It has been called a momentous decision by the press. We submit that momentous decisions involving a revolutionary departure from accepted standards in enforcing the power to search should come from this Court. See planograph opposite and on succeeding page.

DALY DIARY

By Maggie Daly

ONLY THE SHADOW KNOWS . . . Isn't it true the "reliable informant" mentioned in many gambling search warrant applications nowadays is actually a wire tap since police no longer have to disclose the name of the informant? It's all based on the recent Supreme court decision [United States vs. Leo Rugendorf] stating the name of a reliable informer does not have to be disclosed in obtaining a warrant.

PRIMARY STEPPING STONES . . . Politicians are saying Alabama's Gov. George Wallace will wind up in the Senate. He is said to be setting his sights on the seat of Sen. **John Sparkman** who comes up for election in 1966 and is encouraged by the fact that Lister Hill, Alabama's other senator, barely made it in 1962. Wallace has complained that both senators, tho soudly lined up agains' the civil rights bill, are not fighting it vigorously enough.

BACKGROUND . . . The whole scheme behind the attempt to have **Ellen Borden Stevenson** declared incompetent is most dramatic. Overtones and deep undertones of politics.

QUOTE OF THE DAY . . . The Rev. Theodore M. Hesburgh, president of the University of Notre Dame, at a dinner in the Chicago club, telling about his trip to Moscow for an educational meeting and emphasizing the misunderstanding in religion:

"As I was leaving, the last words the rector of Moscow university said were, 'Come and see us again and bring your wife the next time.'"

Father Hesburgh was surprised when a birthday cake was presented and all the dinner guests rose and sang "Happy Birthday" for his 47th.

CONGRATULATIONS TO . . . Jim [Courtesy Man] Moran on receiving the Ford Motor company's distinguished achievement award.

CHICAGO'S AMERICAN 5/27/64

Chicago's American

SATURDAY, JUNE 6, 1964

Bookie Raid May Stick Thru U.S. Court Decision

Prosecution of three men arrested in the Devon avenue headquarters of a 5-million-dollar bookie operation may be aided by a United States Court of Appeals decision handed down here just 11 days ago.

During the hour intelligence unit detectives and internal revenue service agents were in the wire room at 1455½ Devon av., they continually answered four phones they found there.

Two of the callers identified themselves as "Al on the west side" and "Frank on the north side," investigators said, and proceeded to place bets. The agents estimated that these and other wagers totaled $13,000 before they ripped the phones out.

Name Those Arrested

These calls may have provided evidence needed to convict those arrested.

Charged as keepers of a gambling house Friday night were Walter Olski, 43, of 1742 Division st.; Samuel Sterling, 46, of 1415 N. Western av., and Frank Jordan, 52, of 62 E. Chestnut st.

The momentous court decision upheld the right of law enforcement officers to intercept phone calls under such circumstances.

The court ruled on an appeal by three men arrested April 27, 1960, in a raid on a bookie wire room at 3157 N. LeClaire st.

Agents in that raid also answered phones, and recorded comments of the callers.

ation in which, by surreptitious means, a third party overhears a phone conversation between two persons. We believe that impersonation of the intended receiver is not an interception."

It was on the basis of the $14,000 in bets received during their hour raid Friday that revenue agents estimated annual income might be million dollars or more.

Lt. Frank Nash of the intelligence unit estimated the gross might have run over 7 million dollars a year.

Broke Thru Door

Raiders obtained search warrants before smashing a glass-paneled door with fire axes.

Simultaneously, other agents broke into two other rooms at 6230 South Park av., where nine more persons were arrested.

Both raids were part of a synchronized crackdown on gambling in 44 cities from the east coast thru Las Vegas.

Internal revenue agents participated in all the raids, seeking evidence that bookies and other gamblers were failing to buy $50 federal gambling stamps or to pay 10 per cent federal tax on receipts.

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Agents in that raid also answered phones, and recorded comments of the callers.

Quote Judge's Opinion

Judge Luther M. Swygert wrote in his opinion:

"In several instances, one of the agents in response to the callers' questions, 'Who is this?' gave the name of one or the other of the defendants as the person speaking and the caller then placed a bet or asked for racing information."

Swygert, in whose opinion Judge Elmer J. Schnackenberg and Chief Justice John Hastings concurred, wrote that the conversations did not violate 4th and 5th amendment constitutional provisions governing search, seizure, and gathering of evidence.

"Calls Not Intercepted"

Altho the callers were not aware they were talking to agents, rather than the men later charged with gambling, the conversations "cannot be said to have been intercepted," Judge Swygert wrote.

"Interception connotes a situation in which, by surreptitious means, a third party overhears a phone conversation between two persons. We believe that impersonation of the intended receiver is not an interception."

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The Chicago raids were preceded by a seven-month investigation in which detectives watched movements of known gamblers. They found that the central wire room changed location monthly.

Nash said he expected the Devon avenue room to be vacated soon.

III.

The search warrant issued in this case on an affidavit that was so strikingly similar to that issued in *U.S.* v. *Ventresca*, (CA 1), 324 F.2d 864, that an out and out conflict exists between the First Circuit and this Circuit on the type of affidavit. The First Circuit found the affidavit insufficient upon which to rest the issuance of a warrant. It was our position in the Court below that the decision of this Court was in direct conflict with *U.S.* v. *Ventresca*. This Court, upon the application of the United States, granted certiorari in the *Ventresca* case (No. 782, Oct. 1963 Term). The reasons that motivated this Court in the grant of certiorari in *Ventresca* are equally applicable here, and this case should be reviewed in conjunction with that decision of the First Circuit. With full recognition that this Court endorsed the issuance of search warrants on reliable hearsay in *Jones* v. *United States*, 362 U.S. 257, and with further recognition that this Court denied certiorari in *U.S.* v. *McCormick*, 309 F. 2d 367 (7 Cir.), which stood for the proposition that information received by agents of a particular service from his fellow agents constituted reliable hearsay, we submit that both *Jones* and *McCormick* have been extended to a point in this case inconsistent with them and with this Court's decision in *Aguilar* v. *State of Texas*, 84 S. Ct. 1509, and particularly footnote 4 at Page 1513:

> "To approve this affidavit would open the door to easy circumvention of the rule announced in Nathanson and Giordenello. A police officer who arrived at the 'suspicion,' 'belief' or 'mere conclusion' that narcotics were in someone's possession could not obtain a warrant. But he could convey this conclusion to another police officer, who could then secure the warrant by swearing that he had 'received reliable information from a credi-

ble person' that the narcotics were in someone's possession."

In fact, the case at bar went beyond *Ventresca*, in endorsing as a basis for a search warrant "information received from officials" of commercial companies, which companies are without connection with agencies of the United States. The affidavits of the agents in this cause are to be found herein at A. 32-41. The Court will note the striking similarity between them and the affidavit reproduced in the case of *Ventresca* v. *United States*, 324 F. 2d 864. In this sense, this Court should grant certiorari as this case presents an important question of Federal law as to how far this Court's decision in *Jones* has eroded the protections of the Fourth Amendment to the Constitution of the United States.

IV.

In this cause the internal revenue agent's affidavit stated that he had "reason to believe" that upon certain premises "there is now being concealed certain property, namely, memoranda, betting slips, betting pads, books, records of bets, tickets, scratch sheets, telephones, United States currency, calculating machines, and diverse other tools . . . relating to the business of accepting wagering." No observations were made of any of the described property being brought onto the premises. No basis is set forth for "reason to believe" that the described property is on the premises. To our knowledge there has been no Circuit Court decision, aside from this, sustaining the propriety of the search on the allegations made. However, similar warrants have been stricken down in the District Courts with such consistency as to create a conflict between the laws as enforced in other circuits and the law as stated in this cause. We respectfully refer this Honorable Court specifically to

United States v. *Dubin*, D.C. Mass; 217 F. Supp. 206 wherein the Court stated at p. 208:

> "More serious, however, is the absence of any statement of the circumstances which would afford any basis for believing that any gambling paraphernalia were concealed on the premises. There is no statement that the agents saw any of the books and papers or other property of the type listed in the complaint. There is not even any indication that a pencil and paper was used to make any notation of the wagers placed by the agents."

Again the District of Massachusetts and the *United States* v. *Conway*, 217 F. Supp. 853, similarly held at Page 858:

> "But I do point to the absence of any detailed recital as to the wagering transactions which D'Alessandro observed. I cannot tell whether D'Alessandro saw any records or pads or other paraphernalia. If he never saw any such articles, I do not know on what basis he or the Commissioner formed their belief that such articles were present."

The Middle District of Tennessee in the *United States* v. *Simms*, 201 F. Supp. 405 also held similarly that there was presented no basis for belief that the articles would be found on the premises (201 F. Supp. at 408).

While we recognize that these cases do not, in the strict sense, constitute a conflict with decisions of other Circuit Courts of Appeals on the same matter, the repeated decisions of the aforesaid District Courts on the same matter (which decisions necessarily preclude appeals) are the equivalent of conflicts in Circuits. In any event, we submit that the search for the matter described, without basis for believing such matter was on the premises, constitutes the

sanctioning by the United States Court of Appeals of the Seventh Circuit of such a departure from the accepted and usual course of judicial proceedings by the lower Court as to call for an exercise of this Court's power of supervision.

V.

It is our submission that this case constitutes an arrogation by the Executive of the Legislative functions. Even more, it constitutes the imposition of criminal penalties by executive regulation, neither authorized by the Congress nor directed by Statute. To this extent this case is so in derogation of the basic principle of separation of powers as to invoke an exercise of this Court's power of supervision for the sanctioning of a departure from accepted and usual courses of judicial proceedings. Further, this case has decided a Federal question in a way in conflict with applicable decisions of this Court. In *United States* v. *Eaton*, 144 U.S. 677 this Court stated:

> "Much more does this principle apply to a case where it is sought substantially to prescribe a criminal offense by the regulation of a department. It is a principle of criminal law that an offense which may be the subject of criminal procedure is an act committed or omitted 'in violation of a public law, either forbidding or commanding it.' • • • "

This Court has ruled to the same effect in *Steuart and Brothers*, v. *Bowles*, 322 U.S. 398 and *Hampton Jr. and Co.* v. *United States*, 276 U.S. 394, and countless other decisions.

Section 4412 of Title 26, U.S.C., provides that everyone subject to the special occupational tax provided in Sec. 4411 of Title 26 U.S.C. must register with the internal revenue service. No provision is made in Sec. 4412 for the filing of a "return" in enforcement of its provisions. Sec.

7272, Title 26, U.S.C. imposes sanctions for failure to register in accordance with Sec. 4412 in the amount of a $50 penalty. Section 7203 of Title 26, U.S.C. provides no penalty for a willful failure to register. The Court of Appeals for the Seventh Circuit has approved a penitentiary sentence of one year and a $1,000 fine for a willful failure to file the "return" required by Section 4412 despite the facts above-set forth. The reasoning upon which it came to the conclusion that such a penalty was appropriate is set forth in its decision as follows:

> "Section 4412(a) provides that each person required to pay the occupational tax under sections 4401 and 4411 must register with the Internal Revenue Service. Section 4412(c) provides: 'In accordance with regulations prescribed by the Secretary, he or his delegate may require from time to time such supplemental information from any person required to register under this section as may be needful to the enforcement of this chapter.' Pursuant to section 4412(c), the Secretary of the Treasury promulgated regulation Sec. 44.4412-1(a) which reads in part: 'Every person required to pay the special tax imposed by section 4411 shall register and file a return on Form 11-C. For provisions relating to the general requirement for filing a return, see Sec. 44.6011 (a)-1.
>
> "Even though the requirement for registering and filing a return on Form 11-C originates in a regulation, it is given statutory sanction not only by section 4412 (c) but also by section 6011(a) of the Internal Revenue Code of 1954. That section reads in part:
>
> > "'When required by regulations prescribed by the Secretary or his delegate, any person made liable for any tax imposed by this title . . . shall make a return . . . according to the forms and regulations prescribed by the Secretary or his delegates.'
>
> "It is thus apparent that count two charges a statutory offense."

It is our submission that this decision is in out-and-out conflict with this Court's decision in *U.S.* v. *Carroll*, 345 U.S. 457. In that case treasury regulations, such as here involved, require that, together with the income tax form 1096, there be filed informational returns on Forms 1099, showing payments to every person receiving $600 or more in any calendar year. Defendants were prosecuted for failure to fill out these informational forms. This Court found that filing form 1099 was not required by statute, and therefore did not constitute a violation of Sec. 145(a) [the forerunner of Sec. 7203, under which these defendants were convicted]. We submit that the reasoning and basis of the *Carroll* decision is clearly applicable here, where no return is required under Sec. 4412, the regulation alone sets up the requirement as a bookkeeping measure, and the statute (U.S.C. 6011 (a)) implements the regulation, rather than the regulation implementing the statute. We respectfully submit that this is a clear case of executive legislation.

To give further substance to this complaint, the Court will notice that the cases that have come to its attention on a failure to register have been brought under Sec. 7272 of Title 26, U.S.C., (See for example *Ingram* v. *United States*, 360 U.S. 672)

CONCLUSION

Wherefore, for the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Anna R. Lavin
Edward J. Calihan
Attorneys for Petitioners

APPENDIX

OPINION.

IN THE
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 14188 SEPTEMBER TERM, 1963 APRIL SESSION, 1964

UNITED STATES OF AMERICA,
Plaintiff-Appellee.
v.
ANDREW PASHA, PETER GRAFNER, and ARTHUR MONACO,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

May 22, 1964

Before HASTINGS, *Chief Judge*, SCHNACKENBERG and SWYGERT, *Circuit Judges.*

SWYGERT, *Circuit Judge.* Defendants Andrew Pasha, Peter Grafner, and Arthur Monaco were convicted by a jury on a two-count indictment, charging violations of section 7203 of the Internal Revenue Code of 1954.[1] Defendants received prison sentences and were fined. They appeal from the judgments of conviction.

[1] 26 U. S. C. § 7203 reads in pertinent part:
Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return . . . or supply any information, who willfully fails to pay such estimated tax or tax, make such return . . . or supply such information, at the time or times required by law or regulations, shall . . . be guilty of a misdemeanor. . . .

The Sufficiency of the Indictment.

Both counts of the indictment charged that defendants were engaged in the business of accepting wagers from April 25, 1960 to April 27, 1960, and that they received wagers on their own behalf and on behalf of other persons engaged in the business. Count one charged defendants willfully failed to pay the special occupational tax on wagering for the taxable period ending June 30, 1960, as required by section 7203. Count two charged that defendants willfully failed to register with the Chicago district director of Internal Revenue and to file Internal Revenue Form 11-C, as required by law and regulations, in violation of section 7203.

Defendants contend that count one is insufficient because the names of the persons engaged in accepting wagers on whose behalf defendants acted were not named in the indictment.

Section 4401(c) of the Internal Revenue Code of 1954 requires the payment of a tax by one who is engaged in the business of accepting wagers. Section 4411 imposes a similar tax upon those who receive wagers for others whose business is the acceptance of wagers. Thus, an occupational tax is payable by one engaged in the wagering business whether he operates the business or acts as the agent for someone who does conduct the business. Here, defendants were charged both as principals and agents. There was no necessity to recite in the indictment the identity of the principals on whose behalf defendants were acting as agents because the gravamen of the offense is the engaging in the business of accepting wagers either as principal or agent.

Defendants contend that count two of the indictment failed to charge an offense defined by statute. They point out that the count charges a failure to register in accordance with section 4412(a) of the Internal Revenue Code of 1954 and also a failure to make a return on Form 11-C. They assert that the return is not required by statute.

Defendants argue that the failure to file Form 11-C is not proscribed by section 7203 even though that section includes the failure to make a return "required by law or regulations."

Section 4412(a) provides that each person required to pay the occupational tax under sections 4401 and 4411 must register with the Internal Revenue Service. Section 4412(c) provides: "In accordance with regulations prescribed by the Secretary, he or his delegate may require from time to time such supplemental information from any person required to register under this section as may be needful to the enforcement of this chapter." Pursuant to section 4412(c), the Secretary of the Treasury promulgated regulation § 44.4412-1(a) which reads in part: "Every person required to pay the special tax imposed by section 4411 shall register and file a return on Form 11-C. For provisions relating to the general requirement for filing a return, see § 44.6011(a)-1."[2]

Even though the requirement for registering and filing a return on Form 11-C originates in a regulation, it is given statutory sanction not only by section 4412(c) but also by section 6011(a) of the Internal Revenue Code of 1954. That section reads in part:

> When required by regulations prescribed by the Secretary or his delegate, any person made liable for any tax imposed by this title . . . shall make a return . . . according to the forms and regulations prescribed by the Secretary or his delegate.

It is thus apparent that count two charges a statutory offense.

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[2] Treas. Reg. § 44.6011(a)-1(b) reads:
Every person required to pay the special tax imposed by section 4411 shall make a return on Form 11-C in accordance with the instructions and regulations applicable thereto.

The Validity of the Search Warrants.

Prior to defendants' arrest, an Internal Revenue agent executed an affidavit which resulted in a search of premises located at 5129 West Diversey Avenue and 3157 North Leclaire Avenue, Chicago. The agent stated in his affidavit, "There is now being concealed certain property, namely . . . betting slips, betting pads, records of bets, tickets, scratch sheets, telephones, . . calculating machines, and diverse other . . . apparatus, . . and records, relating to the business of accepting wagers." The agent further stated that he made and supervised an investigation of these premises and had maintained a surveillance for some period prior to the search; that agents under his supervision observed the three defendants enter and leave an apartment at the Leclaire Avenue address daily, at regular hours, and that they saw defendants on several occasions at the Diversey Avenue address, a building which had lettering on its front window, Goodman Design & Engineering Co. The affidavit listed numerous telephone calls originating from two numbers assigned to the Leclaire Avenue address to Miami, Florida, New Orleans, Louisiana, and other out-of-state places. The agent stated he had been informed that the Miami and New Orleans number were registered to or used by known gamblers.

We have no difficulty in concluding that the affidavit stated grounds sufficient for the issuance of valid search warrants. *United States* v. *Clancy*, 276 F. 2d 617 (7th Cir. 1960), *rev'd on other grounds*, 365 U.S. 312 (1961); *Merritt* v. *United States*, 249 F. 2d 19 (6th Cir. 1957).

During the search at the Leclaire Avenue address defendant Monaco appeared. A key taken from him was admitted into evidence. It is not clear from the record whether Monaco gave the key in response to an agent's request or if it was taken from him. Whether or not the key was voluntarily produced is immaterial. The evidence was legally obtained by the federal agents. *United States* v. *Rabinowitz*, 339 U.S. 56 (1950); *Clay* v. *United States*, 246 F. 2d 298 (5th Cir.), *cert. denied*, 355 U.S. 863 (1957).

Defendants contend that special agents of the Intelligence Division of the Internal Revenue Service were not authorized to execute the search warrants. They argue that section 7608(b) of the Internal Revenue Code of 1954 (enacted October 23, 1962) giving investigators of the Intelligence Division authority to execute search warrants post-dated the instant search of April 27, 1960. It is clear, however, that section 7608(b) was solely a clarification statute and that Internal Revenue agents had implied authority under section 7803(a) to make arrests and to execute search warrants.[3] *United States* v. *Murphy*, 290 F. 2d 593 (3rd Cir. 1961); *United States* v. *Joseph*, 174 F. Supp. 539 (E. D. Pa. 1959), *aff'd*, 278 F. 2d 504 (3rd Cir.), *cert. denied*, 364 U.S. 823 (1960).

Admissibility of Telephone Conversations.

Defendants assert that the district judge erred in admitting testimony of two agents concerning telephone conversations with unidentified persons who telephoned the apartment at the Leclaire Avenue address during the search of the premises.

The evidence shows that the agents were assigned to answer calls made to the three telephones located on the premises. On some occasions in response to the caller's request to place a bet the agents answered, "Yes," and hung up. In several instances, however, one of the agents, in response to the caller's question, "Who is this?", gave the name of one or the other of the defendants as the person speaking, and the caller then placed a bet or asked for racing information. One caller said, "I hear there's a general raid all over the country." These telephone conversations were admitted into evidence over defendants' objections.

[3] Section 7608(a), enacted in 1958, gave Internal Revenue agents authority to execute search warrants with respect to the enforcement of liquor, tobacco, and firearms revenue laws. This statute was enacted to clarify existing authority of Internal Revenue agents to execute search warrants with respect to enforcement of those laws. 3 U. S. Code Cong. & Ad. News, 85th Cong., 2d Sess. 4395, 4605 (1958). Similarly, section 7608(b), granting authority to investigators of the Intelligence Division of the Internal Revenue Service to execute search warrants, clarified and made specific, the authority of such agents that had existed prior to the 1962 legislation.

Defendants contend that the conversations were hearsay; however, the statements of the unidentified callers were offered only as circumstantial evidence of the type of operation that was being conducted on the premises. Such evidence is competent. *Reynolds* v. *United States*, 225 F. 2d 123 (5th Cir. 1955).

Defendants also contend that the testimony relating to the conversations was inadmissible because the actions of the agents in answering the telephones violated section 605 of the Communications Act of 1934, 47 U.S.C. § 605,[4] as well as the fourth and fifth amendments to the Constitution.

Olmstead v. *United States*, 277 U.S. 438 (1928), is dispositive of the constitutional claims. That case held that telephone conversations intercepted by police officers were not protected by the fourth and fifth amendments.[5]

The question remains whether section 605 of the Communications Act was violated thereby rendering the testimony concerning the conversations inadmissible under the exclusionary doctrine developed in *Nardone* v. *United States*, 302 U.S. 379 (1937), and expanded in *Nardone* v. *United States*, 308 U.S. 338 (1939).

Billeci v. *United States*, 184 F. 2d 394 (D.C. 1950) is authority for the proposition that section 605 is not violated when police officers in answering a telephone do not actively impersonate the intended recipient but merely listen to what the caller has to say. That case held

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[4] 47 U. S. C. § 605 reads in part:

No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, . . *and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person;* . . . (Emphasis added.)

[5] Despite invitations to do so, the Court has not reversed *Olmstead*. *Silverman* v. *United States*, 365 U. S. 505 (1961); *Goldman* v. *United States*, 316 U. S. 129 (1942).

that the action of a United States marshal in picking up a telephone when it rang and listening to the caller, during the search of an alleged gambling establishment, was not an interception within the meaning of section 605. In *Rathbun* v. *United States*, 355 U.S. 107 (1957), the Supreme Court, while not explicitly approving *Billeci* and similar holdings in other cases, impliedly approved that line of decisions.

Although *Billeci* answers in part the question before us, we must still consider the conversations in which one of the agents did impersonate the intended receivers.

The supreme court of New Jersey in *State* v. *Carbone*, 138 N.J. 19, 183 A. 2d 1 (1962), faced this identical problem. In that case a police officer during a raid of the defendant's premises under a search warrant answered the defendant's telephone, impersonated the defendant, and listened to the caller. The court held this did not constitute a violation of section 605. In so ruling the court said:

> The statute was not designed to create a new category of confidential communications. . . . "The protection intended and afforded by the statute is of the means of communication and not of the secrecy of the conversation." *Goldman* v. *United States*. . . . "The communication itself is not privileged and one party may not force the other to secrecy by using a telephone." *Rathbun* v. *United States*. . . .
>
> The . . . statute protects the established line of transmission; the prohibition is against intervention into that channel. This is the view of it we find in *Goldman*.
>
> In *Goldman* . . . the court found no violation of section 605, saying: " . . . [A]s has rightly been held, this word [intercept] indicates the taking or seizure by the way or before arrival at the destined placed. It does not ordinarily connote the obtaining of what is to be sent before, or at the moment, it leaves the

possession of the proposed sender, or after, or at the moment, it comes into the possession of the intended receiver. . . ."

In the case before us, there was no tampering with the established means of communication. Indeed the officer was the immediate party to the call. The bettor intended his words to reach the officer, albeit the better thought he was someone else. Thus the officer did not "intercept" a message while it was *en route* to another; there was no other on the line.

We are in agreement with the view expressed by the New Jersey court. We think the Supreme Court indicated in *Silverman* v. *United States*, 365 U.S. 505 (1961), *Rathbun* v. *United States*, 355 U. S. 107 (1957), and *Goldman* v. *United States*, 316 U. S. 129 (1942), that section 605 should be given a narrow interpretation. *Carbone* is consistent with such an approach.

Although the callers in the instant case were unaware that they were not being heard by the intended receivers and some were even misled into believing they were talking to one or the other of the defendants, the conversations between the callers and the agent cannot be said to have been intercepted. Interception connotes a situation in which by surreptitious means a third party overhears a telephone conversation between two persons. We believe that impersonation of the intended receiver is not an interception within the meaning of the statute. *Cf. Seeber* v. *United States*, 329 F. 2d 572 (9th Cir. 1964).

Moreover, we see no essential difference between the situation in which a police officer picks up the telephone, answers "yes," and proceeds to listen to the caller (as in *Billeci*) and the situation in which the officer explicitly represents that he is the intended receiver. In the latter instance the impersonation is positive, in the first it is passive but impersonation nonetheless.

The Scope of the Evidence.

We find no error in the district judge's instruction to the jury near the end of the Government's case that, with the exception of one exhibit, all the evidence could be considered as to all defendants. Where two or more persons associate together in the commission of a crime or crimes, the acts and declarations of one are admissible as to all. *United States* v. *Bernard*, 287 F. 2d 715 (7th Cir. 1961). As was said in *Cossack* v. *United States*, 82 F. 2d 214, 216 (9th Cir.), *cert. denied*, 298 U. S. 654 (1936):

> The common object of persons associated for illegal purposes forms part of the *res gestae*, and acts done with reference to such object are admissible, though no conspiracy is charged.

Moreover, the district judge did not by the instruction withdraw from the jury, as defendants argue, the issue whether the defendants were engaged in a joint venture to violate the law. A judge's function is to determine the admissibility of evidence. Admissibility may involve preliminary factual determinations which perforce must be made by the judge, not the jury. *Carbo* v. *United States*, 314 F. 2d 718 (9th Cir. 1963).

We have discussed the principal contested issues which are urged for reversal. Defendants present a number of other issues including whether the evidence was sufficient to show defendants' knowledge and willfulness and whether the district judge should have instructed on the issue of a lesser and included offense. They also contend that the judge gave contradictory instructions and unduly restricted cross-examination. We have considered these and other contentions asserted. We find them to be without substance. It is unnecessary to discuss them.

The judgments are affirmed.

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago 10, Illinois
Friday, May 22, 1964

Before

Hon. John S. Hastings, Chief Judge
Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. Luther M. Swygert, Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 14188 *vs.*

ANDREW PASHA, PETER GRAFNER and ARTHUR MONACO,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgments of the said District Court in this cause appealed from be, and the same are hereby, AFFIRMED, in accordance with the opinion of this Court filed this day.

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago, Illinois, 60610
Wednesday, June 17, 1964

Before

Hon. John S. Hastings, Chief Judge
Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. Luther M. Swygert, Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
No. 14188 *vs.*
ANDREW PASHA, PETER GRAFNER and ARTHUR MONACO,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

IT IS ORDERED by the Court that the petition for a rehearing of this cause filed by defendants-appellants be, and the same is hereby, DENIED.

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 293

ANDREW PASHA, PETER GRAFNER, AND ARTHUR MONACO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a–9a) is reported at 332 F. 2d 193.

JURISDICTION

The judgment of the court of appeals was entered on May 22, 1964. A petition for rehearing was denied on June 17, 1964. The petition for a writ of certiorari was filed on July 17, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether officers who, on executing a warrant for the search and seizure of gambling paraphernalia,

741-953—64——1

answered telephones at the premises being searched could testify regarding the telephone conversations.

2. Whether there was probable cause for the issuance of a search warrant.

3. Whether the willful failure to file a wagering tax "return" is an offense punishable by a term of imprisonment.

STATEMENT

Petitioners were convicted in the Northern District of Illinois on a two-count indictment charging them with engaging in the wagering business between April 25 and April 27, 1960 in violation of 26 U.S.C. 7203. Count 1 charged that petitioners willfully failed to pay the special tax on wagering. Count 2 charged that they willfully failed to register and file a wagering tax return (A. 11–12).[1] Each petitioner was sentenced to imprisonment for concurrent one-year terms and fined $1,000 on each count (A. 216–220).

The evidence may be summarized as follows:

In September 1959, petitioner Monaco rented a three-room apartment at 3157 North Leclaire (A. 101, 105). In November 1959, petitioner Pasha, using the alias Sidney Goodman, rented a store at 5129 West Diversey and opened a bank account for Goodman Design and Engineering Company (A. 93, 100), the name placed across the front window of the store (A. 98). The apartment was under surveillance by federal agents during the last week of March 1960 (A. 83–87, 103), and the store was watched between April 20

[1] "A." refers to petitioners' appendix in the court of appeals.

and April 26, 1960 (A. 98–99, 103–104). Petitioners were observed entering and leaving.

On April 27, 1960, acting under a search warrant, federal agents conducted a search at the apartment. Petitioners Pasha and Grafner were present, and petitioner Monaco entered during the raid. Betting slips, scratch sheets, racing forms and three telephones were found in the apartment (A. 105–110, 121). An expert said the paraphernalia was the type used in a wagering-layoff center (A. 158–160, 169–170). Later in the day, a second search warrant was executed at the store. Blank betting paraphernalia, a scratch sheet and three telephones were found in its rear room. The front of the store was vacant except for a disconnected telephone (A. 106–109). Petitioners had not complied with the federal wagering tax provisions (A. 146).

While in the apartment executing the warrant, Agents Homa and Crusor were assigned to answer the telephones, and they received twenty-six calls in an hour (A. 87, 90, 137). Homa identified himself to some callers as "Andy," and one party inquired, "What happened in the first at Keenland?" Another caller responded, "I heard there is a general raid all over the country, the G.'s. * * * They got a guy in New Orleans." Other callers hung up after Homa identified himself as "Andy," "Pete," or "Number ten" (A. 91–92). Another caller told Crusor, "Eighth at New York. No. 12, World Ruler, ten across." Another party asked for the results of two races (A. 140–142).

Petitioners objected to the admission of the contents of these conversations on the ground that the search warrant did not authorize the agents to receive any telephone calls and that such action violated petitioners' constitutional rights under the Fifth Amendment. Petitioners also contended that the conversations constituted hearsay. The objections were overruled by the trial court (A. 88–89, 137, 140, 142).

ARGUMENT

1. Petitioner's belated claim that the evidence of the telephone conversations was illegally obtained under Section 605 of the Communications Act because Agent Homa misrepresented his identity to the callers was properly rejected by the court of appeals. In the first place, the specific objection was never made at trial. Petitioners there contended only that all testimony relating to the telephone calls—whether or not obtained by deceit—should be excluded on the grounds (1) that the agents' conduct was not authorized by the search warrant and (2) that it was hearsay. The second of these grounds has been abandoned in this Court, and the first—which appears to be the basis of petitioner's second ground for certiorari (Pet. 27–30)—is without merit. The agents were lawfully upon the premises and their search warrant authorized them to search for and seize "telephones" as well as "other tools, instruments, apparatus, receptacles and records, relating to the business of accepting wagers" (A. 42). Thus, there can be no claim that they interfered with property

with which they were not authorized to deal. Nor did they intrude upon any protected Fourth Amendment right. The calls were communications to a place where the agents had a right to be, and they were made by means of an instrumentality used in carrying on the wagering business which was the basis of the offense for which petitioners were arrested. The messages were entitled to no greater protection than personal communications among petitioners overheard by the agents in the course of their lawful search (see A. 92). As indicated in *Abel* v. *United States,* 362 U.S. 217, 238, an article which comes into an officer's possession in the course of a search need not be returned merely because it was an unanticipated find. The same rule is applicable here even though the evidence was a verbal statement rather than "an article." *Wong Sun* v. *United States,* 371 U.S. 471, 484–487.

Moreover, the agents' conduct did not violate the Communications Act. Being lawfully present in the apartment, the agents could become parties to a telephone conversation within the meaning of the Communications Act although they were not the subscribers in whose names the telephones were listed. Hence their acts did not amount to "interceptions" within the meaning of Section 605. *Billeci* v. *United States,* 184 F. 2d 394 (C.A. D.C.). Nor did the misrepresentation of their identity violate the Act. As this Court observed in *Sherman* v. *United States,* 356 U.S. 369, 372, "[c]riminal activity is such that stealth and strategy are necessary weapons in the arsenal of the police officer." The police may

represent themselves to be criminals if they are assigned as undercover agents. Just as a person who transfers narcotics face-to-face assumes the risk that his customer may be an undercover agent, so does a gambler using a telephone risk being deceived as to the identity of the other party to his telephone conversation. Each may choose not to deal with persons who are not known to him or whose voice he cannot recognize. The use of the telephone does not provide a shield against decoys.

In any event, petitioners were not parties to the telephone conversations and should not, therefore, be heard to object to their admissibility. As this Court held in *Goldstein* v. *United States*, 316 U.S. 114, 122, even testimony procured by unlawfully intercepted telephone communications is not to be rendered inadmissible "against a person not a party to the message."

2. Two search warrants, one covering the apartment and the other the store, were issued. Probable cause was shown primarily by the affidavit of an Internal Revenue Agent who supervised the investigation. In detailing the facts, this agent stated that telephone company records showed that long-distance telephone calls had been made to the apartment from a Milwaukee phone listed in the name of a known gambler, that long-distance telephone calls made to the apartment from New Orleans and to the store from New Orleans and Miami had been charged to a credit card which had been used for many telephone calls to numbers listed in the names of known gamblers or bookmakers. The affidavit stated that the sources of its

information that such telephones were assigned to bookmakers and gamblers were reports of Internal Revenue officials in Milwaukee, Jacksonville and Louisville and information on file in the office of the District Director in Chicago. The affidavit also stated that agents under the supervision of the affiant had observed the petitioners enter and leave the apartment and store at regular hours (A. 31–41; Pet. 10–20).

The affidavit provided adequate facts to establish probable cause. The information that telephone calls were made to and from gamblers came from Internal Revenue officials in four enumerated cities. Although this was hearsay, the fact that four different sources each reported that numbers called on the credit card were listed in the names of known gamblers provided "a substantial basis for crediting the information." *Jones* v. *United States,* 362 U.S. 257, 269.[2] Since the sources of the information were revealed, this case is not in conflict with *Ventresca* v. *United States,* 324 F. 2d 864 (C.A. 1), certiorari granted June 22, 1964, No. 28, this Term, where the majority of the court of appeals held (erroneously in the government's view) that a supporting affidavit was insufficient if it did not disclose the source of the agent's information.

The agent's statement that he had "reason to believe" that gambling paraphernalia was on the premises was based—as the affidavit on its face disclosed—

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[2] *Aguilar* v. *Texas*, No. 548, O.T. 1963, decided on June 15, 1964, is not in point because the affidavit there did not set forth any supporting facts.

on his reasonable belief that the premises were being used for gambling. There is no requirement that the agent personally see any such property being brought upon the premises if he has a reasonable basis for his belief that it is there. It was sufficient that the detailed facts alleged provided a substantial basis for the Commissioner to conclude that such paraphernalia was probably present. *Jones* v. *United States,* 362 U.S. 257.

3. Petitioners were sentenced to concurrent one-year terms of imprisonment and fined an additional $1,000 under count 2 under a charge that they willfully failed to register and file a wagering tax return. The sentence on the second count was lawful. Section 6011(a) of the Internal Revenue Code provides that the Secretary of the Treasury may require by regulation that a taxpayer file a return; a regulation requiring such returns for wagering occupational taxes was duly issued. Section 7203, under which petitioners were prosecuted, provides that any person required to pay a tax, or "by regulations made under authority thereof to make a return" who willfully fails to do so, is subject to the criminal penalty. Hence the punishment was expressly authorized by Congress. See *Viereck* v. *United States,* 318 U.S. 236, 241.

Petitioners were properly sentenced under Section 7203 since they were convicted of a "willful" failure to file a return. Section 7272, on which petitioners rely (Pet. 34–35), has no application. It provides penalties for non-willful failures to register. Nor is

United States v. *Carroll*, 345 U.S. 457, in point. The issue there was whether each separate failure to file informational returns in a calendar year constituted a separate punishable offense.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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No. 293

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

ANDREW PASHA, PETER GRAFNER, and ARTHUR MONACO,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONERS.

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IN THE

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ANDREW PASHA, PETER GRAFNER, and ARTHUR MONACO,

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

REPLY BRIEF FOR PETITIONERS.

This reply is written principally for the purpose of illuminating the Court, without extensive record reference, as to the actual premises upon which these petitioners pray the issuance of the Writ. The petitioners are of the opinion that the summary treatment of the record by the Government results in an untrue cast upon the actual events.

1. The Government argues that the *specific* objection of violation of Section 605 of the Communications Act was never made at trial, and that the only grounds for exclusion raised were (1) that the agents conduct was not authorized by the search warrant and (2) that it was hearsay (p. 4, Government's brief).

We submit that the foregoing is a misstatement. The "Additional Motion to Suppress" (App. 2) was based exclusively on violations of Section 605. While that motion was not expressly directed to the phone calls complained of, the Court of Appeals for the Seventh Circuit obviously considered the Motion sufficiently comprehensive to includ them, and to devote the major portion of its opinion to the question of whether under Section 605 these conversations could be testified to (App. 6a-8a). Further, the Assistant United States Attorney who briefed the case and argued on appeal never contested that the ground for complaint had been adequately preserved. Further, that Assistant United States Attorney was also trial counsel with a full and complete comprehension of the proceedings. The practical fact is that the decision of the Seventh Circuit is on the law books. It has been regarded as a "momentous" decision. It has been considered the authority for repetition of the mode of invasion of privacy by federal and state officials inaugurated (at least in this area) in this case. With even our limited resources to actual statistics, we are informed it was followed in the following cases now pending in the United States District Court for the Northern District of Illinois alone:

1. *U.S.* v. *Robert J. Paul and Frank Ciconti*, 64 CR 502;
2. *U.S.* v. *Lem Douard and Frank Moliere*, 64 CR 503;
3. *U.S.* v. *Rocco Dote and Theodore P. Veesart*, 64 CR 504;
4. *U.S.* v. *Guglielmo and Delmonico*, 64 CR 505;
5. *U.S.* v. *Louis Gramas*, 64 CR 506;
6. *U.S.* v. *Carl Nicoletti*, 64 CR 507;
7. *U.S.* v. *Thomas Blando*, 64 CR 508.

We, further, submit the record clearly reflects that objection to the introduction of these conversations on the basis of violation of the Fourth, Fifth and Sixth Amendments was fully preserved.

"Miss Lavin: This, your Honor, goes to the very point that I brought up before we started picking any jury. These gentlemen gained access to the apartment for the purpose of executing a search warrant. They did not gain access to the apartment for the purpose of taking over the establishment."

On behalf of the defendants I invoke the Constitutional rights of the defendants."

• • •

"This is not what I am talking about. I am talking about these men going in and sitting down and taking over the apartment, receiving the phone calls, and attempting, as I think they are going to—perhaps I am, as I say, because of my hearing, a little bit anticipatory—I expect we are going to have testimony on that score, and I say that that is violative of the Fifth Amendment to the Constitution of the United States; that the search warrant only warranted them to go in and seize what was described in there, and did not authorize them to take over the premises, and go into business."

• • •

"Miss Lavin: I am going to object to that unless we are able to have a better foundation.

Miss Lavin: Then may I make a further objection, sir, and perhaps this is again anticipatory, that the evidence about to be adduced over my objection will not be directed or I cannot identify against which of the defendants it is being directed." (A. 90)

• • •

"Miss Lavin: I object to the conversation as outside of the presence of the defendants, no sufficient foundation, and it is impossible—

• • •

"Miss Lavin: If your Honor please, before we go any further, what was said over the telephone was obviously out of the presence of the defendants unless there was some kind of an amplifier on that phone.
Mr. Schippers: Your Honor, the same objection was raised as to the testimony of Agent Homa, and we demonstrated the law with respect to that objection.
The Court: You object to his telling about this incident?
Miss Lavin: I object. (A. 140-141)

• • •

"Miss Lavin: Your Honor, I am again going to move to strike the testimony on the ground that it is impossible for me to determine against which of—against whom, if any, of the defendants, that was offered." (A. 142)

• • •

The Government states the warrant authorized the agents to seize "telephones" and, thus, we cannot claim they "interfered with property with which they were not authorized to deal"; that the phone conversations are in the same posture as face-to-face conversations which the parties did not take precautions against being overheard; that *Abel* v. *United States*, 362 U.S. 217 authorized the retaining of an "unanticipated find"; that as law enforcement officers they were allowed to use decoys; and finally, not being parties to the conversation, these petitioners are without standing to object.

We submit the arguments are without merit. First, the authority to seize telephones does not constitute authority to intrude upon, receive and seize telephone messages, and the latter were not within the scope of the warrant. Secondly, face-to-face conversations and decoys are not protected by Section 605, which provides that "no persons *not being entitled thereto* shall receive . . . any interstate

. . . communication by wire and use the same . . ." Thirdly, this was not an "unanticipated find".

> "Q. What was your assignment after you entered the apartment?
> A. I was assigned to answer the telephone calls that may come in." (A. 87)
>
> • • •
>
> "On April 27, 1960, at about 3:30 p.m., I was assigned to assist Special Agent Burton Homa to answer the telephone." (A. 137)
>
> • • •

Finally, the proscription under Section 605 is directed to the interception, and not to the capacity of the objector.

> "No person not being entitled thereto shall . . . *use* the same or any information contained therein for his own benefit or for the benefit of another not entitled thereto . . ." (Section 605, Title 47, U.S.C.) (Emphasis supplied)

2. The Government argues that the search was proper because the "affidavit stated that the sources of its information that such telephones were assigned to bookmakers and gamblers were reports of Internal Revenue officials in Milwaukee, Jacksonville and Louisville, and information *on file* in the office of the District Director in Chicago"; that since four different sources each reported that numbers called on the credit card were listed in the names of known gamblers, there was a substantial basis for crediting the hearsay. The Government concludes that *Ventresca* v. *United States*, 1 Cir., 324 F.2d 864 and *Aguilar* v. *Texas*, 84 S.Ct. 1509, thus do not apply. We disagree. The affiant testified:

> "Q. Do I understand you correctly that your basis for saying these were responsible officials is that someone at Illinois Bell Telephone Company introduced the

source of your information as an inspector of Illinois Bell Telephone Company?
A. Yes". (A. 59-60)

• • •

"Q. Do you know to whom they are known to be gamblers?
A. They are known to be gamblers to the special agents in the area.
Q. Did they tell you that?
A. Yes.
Q. Do you know the basis of their information?
A. I do not." (A. 65)

We submit this is directly within the proscription of both *Ventresca* and *Aguilar*.

"Thus, the affidavit leaves as a complete mystery the manner in which the Investigator discovered their information. There is no indication whatsoever that any of the evidence gathered through the investigation was based upon the personal knowledge or observation of the Investigators. As a consequence there arises doubt that such information was first-hand to the Investigators. The type of fact-finding activities that can qualify under the term 'investigation' are numberless. Investigations can, and frequently do, include the interrogation of witnesses, the receipt of information from informants, the receipt of telephone tips, the checking of files and records, etc. We would have in such a case, not a hearsay affidavit alone, but the distinct possibility of hearsay-upon-hearsay." *Ventresca* v. *U.S.*, 324 F2d 864, 869.

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"The vice in the present affidavit is at least as great as in Nathanson and Giordenello. Here the 'mere conclusion' that petitioner possessed narcotics was not even that of the affiant himself; it was that of an unidentified informant. The affidavit here not only "contains no affirmative allegation that the affiant

spoke with personal knowledge of the matters contained therein,' it does not even contain an 'affirmative allegation' that the affiant's unidentified source 'spoke with personal knowledge.' For all that appears, the source here merely suspected, believed or concluded that there were narcotics in petitioner's possession.' The magistrate here certainly could not 'judge for himself the persuasiveness of the facts relied on * * * to show probable cause.' He necessarily accepted 'without question' the informant's 'suspicion,' 'belief' or 'mere conclusion.'

'To approve this affidavit would open the door to easy circumvention of the rule announced in Nathanson and Giordenello. A police officer who arrived at the 'suspicion,' 'belief' or 'mere conclusion' that narcotics were in someone's possession could not obtain a warrant. But he could convey this conclusion to another police officer, who could then secure the warrant by swearing that he had 'received reliable information from a credible person' that the narcotics were in some one's possession."

Aguilar v. *State of Texas*, 84 S.Ct. 1509, p. 1513, 1514.

In regard to the affiant's stated "reason to believe" that gambling was on the premises, the government argues that it is sufficient that the detailed facts alleged provided a substantial basis for the Commissioner to conclude that such paraphernalis was probably present. We agree with the government's legal statement—but—there were *no* such facts alleged, detailed or otherwise stated.

3. The government's argument merely re-states the decision of the Court of Appeals for the Seventh Circuit. It has not argued the merit of our attack on that decision. We, therefore, rely on argument formerly made.

CONCLUSION.

Wherefore, for the reasons advanced in our Petition and for the reasons in the above and foregoing reply, we pray a Writ of Certiorari issue to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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